IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

WEDNESDAY, THE 20TH JUNE 2007 / 30TH JYAISHTA 1929

SA.No. 798 of 1993()

AS.78/1990 of ADDL. DISTRICT COURT, ALAPPUZHA
OS.107/1984 of SUB COURT, SHERTALLAY

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APPELLANT: 1ST RESPONDENT/PLAINTIFF

NARAYANAN NAMBOOTHIRY MANOHARAN NAMBOOTHIRI,
PALLIKKEEZHIL ILLAM, PADINJATTUMKARA THEKKUM MURI,
THURAVOOR THEKKU VILLAGE.

BY ADV. SRI GIRI V.

RESPONDENTS:APPELLANTS & 2ND RESPONDENT/DEFENDANTS 10,11,12,15 & 21

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1. BHAVANI VASUMATHY, POOTHAKULANGARA,
   PADINJATTUMKARA THEKKUM MURI,
   THURAVOOR THEKKU VILLAGE.

2. MADHAVI THANKAMMA, ARIMBOORADI PADINJARE NIKARTHIL
   -DO- MURI, -DO- -DO-
3. MADHAVI SANTHA OF -DO- -DO-

4. T.N.BHRAMARAVALLY, SHYNI'S BHAWAN, -DO- MURI,
   -DO- VILLAGE.
5. NARAYANAN NARAYANAN NAMBOOTHIRY,
   PALLIKKEZHIL ILLAM, NOW RESIDING AT VELYIL MADOM,
   PALLIPURAM P.O.

BY ADV. SRI.G.UNNIKRISHNAN FOR R1 TO R4

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 20/ 6 /2004 THE COURT ON 20/06/2007 DELIVERED THE FOLLOWING:

M.SASIDHARAN NAMBIAR,J.

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S.A. NO. 798 OF 1993

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Dated this the 20th day of June, 2007

JUDGMENT

Plaintiff in O.S.107/1984 on the file of Sub Court, Cherthala is the appellant. Defendants 10,11,12, 15 and 21 are the respondents. Plaintiff instituted the suit to set aside Ext.A2 to A7 sale deeds executed by 21st defendant, his father contending that the alienations are not for consideration or for the illom necessity and therefore are not valid and binding on the plaintiff or the illom properties. Defendant No.21 was the father of the plaintiff and defendant No.22, mother of 21st defendant. Defendants 21, 22 and plaintiff were admittedly members of Pallikkezhil Illom. Plaint schedule properties originally belonged to the illom. Under schedule C of Ext.A1 settlement deed dated 6.2.1963, plaint schedule properties were allotted to the Sakha consisting of plaintiff and his parents. His

mother Saraswathi Antherjanam subsequently released her right in favour of husband, 21st defendant and son plaintiff. Subsequently Ext.A4 sale deed was executed on 15.7.1968 in favour of 9th defendant who in turn assigned it to 15th defendant under Ext.B11 sale deed. Ext.A4 was executed by the father for himself and for the minor son plaintiff. Ext.A5 sale deed was executed on 16.7.1969 in favour of 10th defendant. 10th defendant later alienated the property in favour of respondents 16 to 18. Ext.A6 sale deed was executed on 13-4-1970 in favour of defendants 11 and 12. Similarly Ext.A2 sale deed was executed on 23.5.1966. Ext.A3 sale deed was executed on 8.3.1967 and Ext.A7 dated 27.8.1970. Plaintiff contended that these alienations are invalid as they are not supported by consideration and as they were not for the illom necessity or benefit and therefore to be set aside and in any case plaintiff is entitled to get half share in the plaint schedule property.

2.Defendants 1 to 4 filed a joint written statement and defendants 10 to 15 filed a separate written statements. Defendants contended that the alienations were made for illom necessity and for valid consideration and so they are valid and binding on the plaintiff and the illom properties and plaintiff is not entitled to challenge the same and is not entitled to the decree sought for. Defendants 13 and 14 who obtained right under Ext.A7 sale deed also claimed fixity of tenure under Kerala Land Reforms Act. That question was referred to the Land Tribunal. Land Tribunal upheld the claim. Learned Sub Judge on the evidence of Pws.1 to 3 and Exts.A1 to A16, Exts.B1 to B23 and X1 to X3 found that Ext.A2 and A7 sale deeds are valid and binding on the plaintiff and he is not entitled to challenge the same. But holding that Exts.A3 to A6 sale deeds are valid only in respect of only the half share of 21st defendant and are not valid and binding on plaintiff a preliminary decree for partition was passed.

Defendants 10,11,12 and 15 challenged the preliminary decree and judgment before Additional District Court, Alappuzha in A.S.78/1990 contending that learned Sub Judge should have upheld Ext.A4 to A6 alienations also and should have found that properties covered thereunder are not available for partition. Plaintiff on his part challenged the preliminary decree whereunder Exts.A2 and A7 alienations were upheld by the trial court in A.S.397/1990 before this court. Similarly defendants 1 to 8 challenged the preliminary decree and judgment before this court in A.S.363/1991, contending that learned Sub Judge should have found that Ext.A3 sale deed was also valid as it was for illom necessity and therefore the property covered under Ext.A3 should have been excluded from partition.

3. Unfortunately pendancy of A.S.78/1990 before the Sub Court was not brought to the notice of this court. As a result, the said first appeal happened to be disposed of by Additional District

Judge, Alappuzha independently and that appeal was not called for to this court to be disposed of with other connected pending first appeals. Learned District Judge on reappreciation of evidence upheld Exts.A4 to A6 alienations holding that those sale deeds were executed by the father for the minor son also for valid consideration and for illom necessity and therefore they are valid and binding on the plaintiff. The Second Appeal is filed challenging the decree and judgment passed by Additional District Judge in A.S.78/1990 under which Exts.A4 to A6 sale deeds were found valid and binding on the plaintiff and the properties covered thereunder not available for partition.

4. Meanwhile A.S.397/1990 and 363/1991 were heard and disposed by a common judgment dated 6.2.2002. Even while the said first appeals were disposed of the fact that this Second Appeal is pending, was not brought to the notice of the leanred Single Judge. Consequently the second appeal was not heard along with the first appeals.

In the first appeals the learned single Judge upheld Ext.A3 sale deed also and confirmed the alienations under Ext.A2 and A7 sale deeds. As a result of the findings in A.S.397/1990 and A.S.363/1991 which has become final except with regard to the alienations under Exts.A4 to A6 and availability of the properties covered thereunder, the other dispute between the parties are now concluded.

5. Learned single Judge confirmed the finding of the learned Sub Judge that Ext.A2 and A7 alienations are valid and binding on the plaintiff and those properties are not available for partition. In addition, this court held that Ext.A3 sale deed was also executed for consideration and for illom necessity and therefore valid and binding on the plaintiff and the property covered thereunder is not available for partition. What remains is whether Ext.A4 to A6 alienations are valid and binding on the plaintiff and if not, whether the properties covered thereunder are

available for partition.

6. Learned counsel appearing for the appellant vehemently argued that courts below did not properly consider the impact of Section 5 and 8 of Kerala Nambudiri Act, 1958,(hereinafter referred to as the Act) and the fact that defendants 10,11, 12 and 15 who claim right under Ext.A4 to A6 sale deeds did not adduce any evidence and even did not mount the box to depose that they had made any inquiries with regard to the illom necessity, should have persuaded courts below to hold that Exts.A4 to A6 alienations are not for illom necessity. It was further argued that under Section 5 of the Act, no sale or mortgage of immovable property of an illom shall be valid unless the sale deed was executed by the karnavan for consideration and also for illom necessity or the benefit of illom and also with the written consent of the majority of the major members and under section 8 of the Act, the burden is on the alienee to establish that it was for the Illom necessity or

for the benefit of the illom and on the failure of the alienees to adduce evidence, courts below should not have interfered with the findings of the trial court and should have found that the properties covered under Exts.A4 to A6 sale deeds are available for partition. Reliance was placed on the decision of a Full Bench of this Court in **Venkiteswara Kammathi Balakrishna Kammathi v. Anantha Pai Ganesha Pai (1954 K.L.T. 87).**

7.Learned counsel appearing for the contesting respondents argued that the facts appreciated by first appellate court establish that the facts are similar to the alienations which was upheld by this court in the first appeal A.S.397/1990 and 363/1991. It was pointed out that similar recitals as in Ext.A2,A3 and A7 are there in Ext.A4 to A6 also and the trial court and this court found that the alienations are for illom necessity and therefore the said findings are applicable in respect of the alienations covered under Exts.A4 to

A6 also. Learned counsel also argued that as found by the learned single Judge in the first appeals, when 21st defendant the father was the only major member available in the illom and he executed Exts.A4 to A6 sale deeds, proviso to Section 8 of the Act applies and court has to presume that such necessity were there as stated in Section 5 and therefore first appellate court rightly upheld Ext.A4 to A6 and there is no reason to interfere with the findings of the first appellate court.

8. The Second Appeal was admitted formulating the following substantial question of law.

On whom the burden of proof lies in a case, where sale deeds executed by the father for the memberson also, alienating the properties of the illom covered under the Act is challenged for want of consideration and illom necessity, to prove that the alienations were for consideration and illom necessity or the benefit of illom and on the evidence on record whether Ext.A4 to A6 alienations are valid.

9. Ext.A4 sale deed was executed in favour of 9th defendant on 15.7.1968. The consideration was Rs.1000/-. Ext.A5 sale deed was executed on 16.7.1969. Its consideration was Rs.7000/-. Ext.A6 sale deed was executed on 13.4.1980. The consideration shown is Rs.300/-. The assignees under Exts.A4 to A6 were not examined. Infact, no oral evidence was adduced by the contesting respondents who seek to uphold Ext.A4 to A6 alienations. On the side of the plaintiff, he was examined as PW1 and a witness was examined as PW3. The evidence of PW3 was not at all helpful to decide the question whether the alienations are for illom necessity or for the benefit or and whether they were for consideration. Exts.A4 to A6 show that consideration thereunder was received by the 21st defendant who executed the sale deed on behalf of the plaintiff also. As rightly pointed out by learned counsel appeaing for the contesting respondents, apart from the recitals about the passing of consideration in Exts.A4 to A6,

plaintiff as PW1 admitted that his father had received the consideration shown therein. Therefore first appellate court rightly found that Ext.A4 to A6 were supported by consideration. The only question is whether the alienations are for illom necessity or benefit.

10. Section 5 of the Act reads:-

> "(1) No sale or mortgage of any immovable property of an illom and no lease of any such property shall be valid, unless it is executed by the karnavan for consideration, for illom necessity or benefit, and with the written consent of the majority of the major members of the illom.

(2)Nothing contained in sub-section (1) shall be deemed to affect the validity of any sale, mortgage or lease executed before the commencement of this Act in accordance with the law in force at the time of such execution."

Section 7 provides that it shall be lawful for the karnavan to contract, or enter into debts or transaction other than those falling under section 5, without the written consent of the majority of the members of the illom. The proviso mandates that the debts or transactions so contracted or entered into are for illom necessity or benefit.

11.Section 8 reads:-

"The burden of proving illom necessity or benefit shall

> be on the purchaser, mortgagee, pledgee, or other alienee, or creditor, as the case may be. But the court may presume such necessity where the majority of the major members of the illom are parties to or have given their written consent to the transaction."

A combined reading of Section 5 and Section 8 establish that the burden of proving illom necessity or benefit shall be on the purchaser, mortgagee, pledgee, or other alienee. But the proviso mandates that where the majority of the major members of the illom are parties to or have given their written consent to the transaction, the court may presume that the alienations are for illom necessity as provided under section 5. Section 5 provides that no sale or mortgage of any immovable property of illom shall be valid, unless

it is executed by the karnavan and the alienation is for considertion and for illom necessity or benefit and also with the written consent of the majority of major members. Because of the proviso to Section 8, if an alienation is made by the karnavan with the written consent of the majority of the major members and for consideration, then court may presume that it is for the illom necessity.

12. When Ext.A4 to A6 alienations were made the only members of the illom were defendant No.21 and the plaintiff. Admittedly Saraswathi Antherjanam the other member of the illom the mother of plaintiff, had released all her rights in favour of her husband and son the plaintiff and 21st defendant under Ext.B2. Therefore when Ext.A4 to A6 alienations were made, the only major member of the illom was 21st defendant. The question is when the only members of the illom are a major and a minor and the alienations are made by the major for the minor also, can it be said that the

alienations are made with the consent of the majority of the major members so as to attract section 8 of the Act. This question was considered by the learned single Judge in the first appeal referred to earlier and held that as 21st defendant was the only major member of the illom and he executed the sale deeds, proviso to Section 8 applies.That decision was rendered in the same suit. Hence at least as against the plaintiff who was the appellant in one of the appeals and that too against the very same preliminary decree of this case, the finding is binding. In such circumstances, I do not find it necessary to go further on that question. Exts.A4 to A6 alienations also attract the provisions of proviso to Section 8.

13. Similar recitals in Exts.A2, A3 and A7 were considered by this court in the first appeals and it was held that the alienations are for illom necessity. In the light of the said finding, the factual finding of the first appellate court that

Exts.A4 to A6 alienations are for illom necessity cannot be challenged. In any event, that factual finding cannot be reconsidered by this court in exercise of the limited scope of the powers provided under section 100 of the Civil Procedure Code. Therefore as it is proved that Ext.A4 to A6 sale deeds were executed for consideration and the alienations are for illom necessity, they are valid and binding on the plaintiff. Therefore the properties covered under Exts.A4 to A6 are also not available for partition.

Second appeal is dismissed.

M.SASIDHARAN NAMBIAR
JUDGE

tpl/-

M.SASIDHARAN NAMBIAR, J.

S.A.NO.798 /03

JUDGMENT

20TH JUNE ,2007